NO. A09-935

State of Minnesota
In Supreme Court

SCI Minnesota Funeral Services, Inc.,
Corinthian Enterprises, LLC,

Appellants,

v.

Washburn-McReavy Funeral Corporation,
Washburn-McReavy Cemetery Association,

Respondents.

BRIEF AND APPENDIX OF RESPONDENTS

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STATEMENT OF ISSUES

I. While the legal determination of whether a plaintiff has made a prima facie case for equitable relief is reviewed *de novo*, the trial court's decision to grant or withhold equitable relief based on the facts presented is reviewed for whether the ruling is "manifestly contrary to the evidence." Did the plaintiff fail to present a prima facie case on the undisputed facts?

Both the district court and the court of appeals majority concluded that SCI had not established its entitlement to equitable relief.

Most apposite authorities:

Metro Office Parks Co. v. Control Data Corp., 295 Minn. 348, 205 N.W.2d 121 (1973); and

Golden Valley Shopping Ctr., Inc. v. Super Value Realty, Inc., 256 Minn. 324, 98 N.W.2d 55 (1959).

II. Should Minnesota law be changed to require consideration of contract reformation when the parties executed a contract containing the exact terms to which they had agreed, but one party claims it was mistaken regarding the extent of its obligation?

The district court and court of appeals correctly adhered to precedent precluding contract reformation when the reformed terms were not expressly agreed to prior to execution of the underlying contract.

Most apposite authorities:

Nichols v. Shelard Nat'l Bank, 294 N.W.2d 730 (Minn. 1980);

Theros v. Phillips, 256 N.W.2d 852 (Minn. 1977); and

Cool v. Hubbard, 293 Minn. 349, 199 N.W.2d 510 (1972).

III. Should Minnesota law be changed so as to compel consideration of rescinding a stock transaction when the only grounds for relief are a purported lack of mutual assent

and/or a mistake regarding the underlying assets owned by the corporation whose stock was sold?

The district court and court of appeals found the executed contract did exactly what the parties expected it to do (*i.e.,* transfer stock ownership), and adhered to established jurisprudence rejecting mistake claims regarding assets underlying stock transactions.

Most apposite authorities:

Costello v. Sykes, 143 Minn. 109, 172 N.W. 907 (1919); and

First Nat'l Bank of Birmingham v. Perfection Bedding Co., 631 F.2d 31 (5th Cir. 1980).

INTRODUCTION AND OVERVIEW

SCI Minnesota Funeral Services, Inc. ("SCI") sold the corporate stock of its subsidiary, Crystal Lake Cemetery Association, knowing that the transfer of stock carried with it all of Crystal Lake's underlying assets and liabilities. Represented by experienced counsel, and itself being part of a sophisticated, billion-dollar conglomerate, SCI executed a contract containing the exact transaction terms it negotiated and agreed to. Years after the agreement was consummated, SCI sought to reform or rescind the contract, claiming that it had been mistaken about the extent of the property owned by its subsidiary. Its claims were rejected by both courts below, based on established Minnesota law.

SCI asks this court to throw out nearly a century of precedent so that SCI might convince the district court to re-write the contract to impose new terms to make up for SCI's admitted failure of due diligence. This court should decline SCI's invitation to re-cast Minnesota law on such a record. The fact that SCI sold the stock of a corporation with underlying assets greater than SCI recalled at the time – which is the only fact on which SCI bases its claim – has never been sufficient to invoke the extraordinary remedies of reformation or rescission. This court should affirm the enforcement of the parties' agreement.

This is not a case of first impression. The district court and the court of appeals did not create new rules for stock transactions, but merely applied settled law to undisputed facts. Minnesota law has long imposed predicates to invoking the courts' equitable powers, and courts have faithfully enforced those standards in reformation and

rescission cases like this when one party's mistake benefits another. This court has consistently held that a plaintiff requesting reformation must first establish that the parties actually agreed to the would-be reformed terms, but that through a mistake they executed different terms. In a similar vein, this court has required that a plaintiff seeking to rescind a stock transaction first establish a mistake about the actual subject matter of the transaction (*i.e.*, the stock), and not merely a mistake about the assets underlying the stock. The undisputed record demonstrates both that the parties executed a contract containing the precise terms they negotiated and agreed to, and that SCI's mistake was self-inflicted in failing to conduct the most basic of due diligence to indentify the extent of the assets underlying the stock it sold.

SCI attempts to obscure the straightforward application of settled law to undisputed facts. Contrary to SCI's presentation, the lower courts did not hold stock transactions to be categorically immune from the equitable relief demanded, but merely held that in this case there was no evidence of an agreement on contractual terms different from those executed, nor any mistake about the subject matter of the parties' agreement. SCI also implies this was an asset transaction that was transformed at the last moment into a stock transaction, but the undisputed record is that from the very start the parties intended to make the corporate stock the subject matter of the transaction in order to continue Crystal Lake's status as a for-profit entity. Without continuation of the corporate form, the underlying business was neither marketable by SCI nor attractive to the eventual buyer, Washburn-McReavy Funeral Corporation ("Washburn-McReavy"). Hence the sale of the stock, and not the assets, was the very point of the transaction.

SCI's entire case is about one thing: Washburn-McReavy unknowingly benefited from SCI's repeated due diligence failures. But that circumstance alone does not entitle SCI to equitable relief. Before courts will even consider taking the extraordinary step of interfering in private transactions, the plaintiff must prove that the parties actually agreed to terms different from those executed and that the parties were mutually mistaken about the subject matter of the contract. Had SCI presented such evidence, the relevant stock transactions – like any contracts – would have been subject to equitable consideration. In reality, the undisputed record in this case is to the exact contrary of the required showing. In short, SCI failed to make out a prima facie case that invoked the equitable doctrines of reformation or rescission.

Even considering the equities, SCI fares no better. The parties all knew that all underlying assets would follow the corporate stock. As the seller, SCI was in control of all information relating to such assets. SCI admitted that reasonable due diligence would have reminded SCI of the extent of assets held by Crystal Lake. Moreover, the parties specifically included in their agreement a provision that provided SCI with a mechanism to remove from the transactions those assets that it did not intend to be part of the sale. Thus, even after the parties struck their agreement, SCI had a contracted-for, second-chance opportunity to – prior to closing – remove from the company those assets unrelated to the business operations. Still, SCI did nothing.

This court has struck a balance between affording equity to parties when contracts do not match the agreed-to terms, and refusing to intercede when parties merely wish

they had agreed to different terms. Nothing in this case justifies recasting the standards by which commercial transactions have been well and predictably governed for so long.

BACKGROUND

I. THE UNDERLYING LITIGATION

On June 10, 2008, SCI sued Washburn-McReavy seeking to reform or rescind a transaction completed three years earlier.[1] The Dakota County District Court, the Honorable Kathryn D. Messerich, denied Washburn-McReavy's motion to dismiss the lawsuit on the pleadings, concluding that SCI had stated a claim upon which relief might be granted and that a factual record had to be developed before the court could decide whether the evidence satisfied Minnesota's standards for considering equitable relief like reformation and/or rescission. (Add. 36-41).[2]

After conducting written discovery and taking the deposition testimony of four witnesses, the parties filed cross motions for summary judgment. Judge Messerich found that the material facts were undisputed and that the law compelled summary judgment for Washburn McReavy. (Add. at 24-35).

On review, the court of appeals unanimously found that the summary judgment order should be affirmed so long as it was not "manifestly contrary to the evidence."

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[1] SCI subsequently filed an amended complaint naming as a defendant Corinthian Enterprises, LLC, which bought the Crystal Lake stock from SCI and immediately sold it to Washburn-McReavy. (SCI's appendix ("App.") at 11-19). SCI later reached an understanding with Corinthian whereby SCI's counsel began representing Corinthian; on November 20, 2008, SCI amended the complaint again to make Corinthian a plaintiff rather than a target of the litigation. *See* Second Amended Complaint (App. at 27-35).

[2] References to "Add." are to SCI's addendum.

(Add. at 5-6). The appellate court also unanimously concluded that SCI was not entitled to rescission on the ground of lack of mutual assent. (*Id.* at 11-14, 18). Judge Worke dissented only on the reformation claim. Judge Worke departed from the majority's reliance on this court's prior decisions, and instead relied on an Iowa Supreme Court decision which, contrary to Minnesota law, asks courts to "look beyond the form of the asset transferred (corporate stock) to the substance of the transfer (corporate assets and liabilities)." (*Id.* at 22).

II. THE UNDISPUTED FACTS

The material facts in a case based on an alleged "mistake" of fact are (1) the contract terms the parties actually agreed to and (2) the contract terms the parties executed. *See, e.g., Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980); *Costello v. Sykes*, 143 Minn. 109, 110-12, 172 N.W. 907, 908-09 (1919). Judge Messerich found the evidence on these points to be undisputed. Although SCI takes no issue with the district court's findings, its presentation of the record is at times incomplete and otherwise misleading on several critical points.

A. The Parties

SCI is a subsidiary of Service Corporation International, a Houston, Texas-based conglomerate with more than $2 billion in annual revenues. SCI's corporate existence lapsed in 2008, but was revived in conjunction with this lawsuit. While in business, SCI was part of Service Corporation International's network of more than 1,200 funeral service locations and 350 cemeteries through the United States, Canada, Puerto Rico, and Germany.

In 2005, SCI's parent corporation decided to sell a number of business interests, including the holdings of SCI. (Add. at 26). Among the SCI interests for sale was ownership of Crystal Lake. (*Id.*)

Corinthian Enterprises, LLC, is a Texas company. Corinthian (run by former SCI executive Lowell Kirkpatrick) agreed to purchase from SCI the corporate stock of Crystal Lake (and separately agreed to acquire certain assets of SCI). (*Id.* at 26-27).

Washburn-McReavy is a family-owned, Minnesota company in its 153rd year of business. Washburn-McReavy operates 16 funeral home and cemetery locations in the Twin Cities, including Crystal Lake, whose stock it acquired from Corinthian. (*Id.* at 27-28).

B. The Stock Transactions

SCI sold the Crystal Lake stock to Corinthian in a Stock Purchase Agreement. (Add. at 26-27). Corinthian immediately sold the Crystal Lake stock to Washburn-McReavy in a Share Purchase Agreement. (*Id.* at 27-28). The parties' decision to transact the Crystal Lake stock (as opposed to its assets) is significant as it carries important legal consequences (described in detail below).

SCI inaccurately suggests that the parties agreed to an asset transaction but later decided on a stock deal. *See, e.g.*, SCI brief at 5, 6. The record is clear that SCI and Corinthian always intended to structure the Crystal Lake portion of their deal as a stock transaction. (Add. at 27). Based on the testimony of SCI's own witnesses, the district court found that the parties never considered another form of agreement, and certainly never actually agreed to another form of contract. (*Id.*) ("From the very beginning, SCI

and Corinthian intended to structure the Crystal Lake portion of their deal as a stock transaction.") (emphasis added).

Minnesota law required that the agreement be a stock transaction to enable Crystal Lake to continue to be operated as a for-profit corporation. (*Id.* at 4).[3] While SCI suggests that the transaction was structured as a stock transaction for Washburn-McReavy's benefit (SCI brief at 3, 6), SCI needed a stock sale in order to market Crystal Lake. If only the assets were sold, the buyer would be unable to employ them as part of a for-profit enterprise, thereby substantially impairing Crystal Lake's value. Engaging in a stock sale, however, afforded SCI the opportunity to sell a profit stream, and thus the form of the parties' agreement benefitted SCI as much as anyone. The record reflects, and Judge Messerich found, that "Crystal Lake's stock was the subject matter of the parties' ultimate Stock Sale Agreement." (Add. at 27).

The record is also undisputed that all parties understood that transferring the stock of a company automatically transferred ownership of all underlying assets and liabilities of that company. (Add. at 34); (App. at 27 ("the sale of stock includes everything underneath it")); (App. at 28-29 (agreeing that when stock is sold it includes "everything known and unknown")). This reflects the reality of Minnesota law that all assets follow the stock. *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 536 (Minn. 1986) ("When

[3] Minnesota law limits the acquisition of a cemetery to certain non-profit organizations. Minn. Stat. § 306.88 (2008). A pre-March 1, 1906 company may continue to operate a cemetery for profit. Minn. Stat. § 306.01 (2008). Hence, to acquire a cemetery for profit purposes, a buyer today cannot simply acquire the cemetery asset itself, but must acquire the entire company that has owned the cemetery since before March 1, 1906.

a business is sold through a stock transfer, the buyer assumes not only the assets of the corporation, but also the liabilities.") (quotation omitted).

In fact, the parties demonstrated their understanding that all Crystal Lake assets would automatically transfer to the new owner of the stock by taking steps (and actually agreeing) to exclude certain property held by Crystal Lake prior to closing. (App. at 60 (Q. You agreed to exclude certain assets? A. Yes sir. Q. Which assets are those? A. Cash. I think that would probably be it.")) (emphasis added). Additionally, the contract provided that "prior to the Closing, SCI shall cause to be removed from the Corporation [*i.e.*, Crystal Lake] . . . all other assets of the Corporation which are not utilized in or related to the operation of the Business." (App. at 241). Thus SCI had a second chance to remove previously-unidentified assets if accomplished prior to closing. The parties clearly knew that all assets left in Crystal Lake would transfer with the stock, and specifically agreed to a mechanism by which SCI could exclude from that transfer property held by Crystal Lake that it chose not to sell.

C. The Underlying Assets

The assets held by Crystal Lake stock included a cemetery/crematory located at 3816 Penn Avenue North, in Minneapolis, Don Valley Funeral Home/Memorial Park located in Bloomington, Minnesota, Glen Haven Memorial Gardens, located in Crystal, Minnesota, approximately 8 acres of land in Burnsville, Minnesota, and approximately

3.6 acres of land in Lakewood, Colorado. (Add. at 26, 28).[4] Pursuant to the parties' agreements, and under general principles of Minnesota corporate law, all of these assets followed the Crystal Lake stock unless specifically excluded by SCI prior to closing.

D. SCI's Due Diligence Failures

SCI had the responsibility, and ample opportunity, to conduct due diligence regarding the Crystal Lake assets prior to closing. Necessarily, SCI had the upper hand in ascertaining the extent of assets underlying the Crystal Lake stock; after all, it was SCI's own business being sold. (App. at 290) (deposition of SCI's then-chief dealmaker) ("Q. Did SCI have the means of discovering that these two parcels were owned by Crystal Lake? A. Yes, I suppose it did.").

SCI protests that the particular SCI agents handling the Crystal Lake stock sale were not aware of all the underlying assets they were selling,[5] but Judge Messerich sensibly found that SCI as a corporate entity obviously knew the Crystal Lake stock included ownership of the Vacant Land. (Add. at 30) ("Someone at SCI knew that the vacant land was part of the Crystal Lake assets – the land did not spontaneously become a Crystal Lake asset without the action of an SCI agent or employee."). The SCI real estate department certainly knew that Crystal Lake's assets included the Vacant Land. (Add. At 56). Such corporate knowledge, and its imputation to SCI, is compelled by Minnesota law. *See, e.g., Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d

[4] For ease of reference, the Burnsville and Lakewood properties are referred to as the "Vacant Land."

[5] *See, e.g.*, SCI brief at 4 ("none of the parties involved in negotiating the sale transactions knew").

888, 895-896 (Minn. 2006) ("It is true that a corporation is charged with knowledge...of all material facts of which its officer or agent...acquires knowledge while acting in the course of employment within the scope of his or her authority.") (quoting 3 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 790 (2002)) (other citation omitted).

Christopher Cruger (the SCI executive in charge of the transaction) testified that adequate due diligence could have and should have confirmed all of the underlying substantive assets – including the Vacant Land:

> I would expect that identifying the ownership of these two parcels of land would have been identified during the necessary title work and perhaps in some of the legal due diligence and steps in the divestiture. So that would make up Maggie Reynolds, and Ray Gipson would have – I would have hoped had identified that early on in this process.

(App. at 289). Nonetheless, SCI did not exclude the Vacant Land assets from the sale.

E. <u>All Assets Transfer At Closing</u>

The agreement transferring ownership of the Crystal Lake corporate stock from SCI to Corinthian was closed on July 20, 2005. (Add. at 27). Importantly, SCI admits that it did not ask Corinthian to exclude the Vacant Land assets from the transaction, and that Corinthian did not agree to exclude the Vacant Land from the deal. (App. 290). It is undisputed that ownership of the Vacant Land did, in fact, transfer to Corinthian by virtue of Corinthian's ownership of the Crystal Lake corporate stock.

Corinthian immediately sold to Washburn-McReavy most of what it had just purchased from SCI, including the Crystal Lake stock and some assets in a separate

transaction. The total price of the agreements between Corinthian and Washburn-McReavy was $6.5 million. (App. at 198).[6]

In selling the Crystal Lake stock, Corinthian admits that it did not ask that the Vacant Land assets be excluded, and that Washburn-McReavy did not agree to exclude the Vacant Land from the assets underlying the stock. (App. at 65-67).

F. Long After Closing, SCI Demands New Terms

Nearly three years after these transactions were concluded, SCI declared for the first time that it had not intended to transfer the Vacant Land, despite having negotiated and then executed a contract that accomplished exactly that, and despite that it had failed totally to avail itself of the contractual opportunity to exclude the land from the transaction before closing. In fact, SCI admits that at the time of the transactions it had no intent to exclude the Vacant Land assets, but simply claims it "could not have considered whether to exclude the Vacant Land." (Washburn-McReavy Appendix at RA.5 (SCI's Response to Admission Requests Nos. 2-4)). SCI most certainly could have considered whether to exclude the Vacant Land – its corporate knowledge of the assets leaves no other conclusion.

SCI asked Judge Messerich to reform the transactions by adding a new clause "so that the Vacant Land is expressly excluded" from Crystal Lake's ownership. (App. at 33). But SCI's requested new term flies in the face of unequivocal testimony that the

[6] SCI's repeated characterization of the transaction as a $1 million sale with a $2 million mistake is clearly not accurate. The parties agreed to a $6.5 million sale price for all the agreements, and for business reasons SCI allocated of $1 million to the Crystal Lake stock. (*Id.* at 190).

parties never had such an agreement. Corinthian's dealmaker, Lowell Kirkpatrick, testified without contradiction:

> Q. [W]ere you asked to exclude the Colorado parcel from that transaction [with SCI], from the Crystal Lake transaction?
>
> A. No sir.
>
> * * *
>
> Q. [W]ere you asked to exclude the Burnsville parcel from the Crystal Lake transaction?
>
> A. No, sir.
>
> * * *
>
> Q. [D]id Corinthian ask Washburn-McReavy to exclude this Colorado parcel from the Crystal Lake transaction?
>
> A. No, sir.
>
> * * *
>
> Q. Just so we are clear on the record, Corinthian did not ask Washburn-McReavy to exclude the Burnsville parcel from the Crystal Lake transaction?
>
> A. No, sir.
>
> Q. No, Corinthian did not ask?
>
> A. No, Corinthian did not ask.

(App. at 65-67).

For SCI, Cruger was even more blunt:

> Q. Was there ever an agreement to exclude these parcels from the Stock Sale Agreement?
>
> A. <u>There was no specific agreement to exclude them from this transaction</u>.

(App. at 290).

In short, the record could not be more clear that (1) SCI executed a contract containing the exact terms it negotiated and agreed to, (2) the parties never agreed to the proposed reformation term, and (3) while the parties' agreements specifically contemplated the exclusion of certain assets at SCI's request prior to closing, SCI never asked to exclude the assets it now seeks to recover through its reformation claim.

ARGUMENT

I. STANDARD OF REVIEW

In reformation claims, the district court's exercise of equitable powers will be upheld unless "manifestly contrary to the evidence." *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 353, 205 N.W.2d 121, 124 (1973); *Golden Valley Shopping Ctr., Inc. v. Super Valu Realty, Inc.*, 256 Minn. 324, 329, 98 N.W.2d 55, 58 (1959). The same standard applies to decisions involving the exercise of equitable power in cases of rescission. *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979).

Prior to a district court actually exercising its equitable powers, however, the court first determines whether a prima facie case has been made sufficient to invoke the consideration of equitable relief in the first place. *See, e.g., Nichols v. Shelard National Bank*, 294 N.W.2d 730, 734 (Minn. 1980) (setting forth prerequisites to equitable consideration). If a prima facie case has not been established, the claims necessarily fail. Even when a prima facie case has been established, however, the district court still possesses discretion as to whether to grant or deny relief in light of the weight of the evidentiary record and equities. *See, e.g., id.* (case for reformation "must be established by evidence which is clear and consistent, unequivocal and convincing").

In this case, both the district court and court of appeals concluded that SCI had not made a prima facie case for reformation or rescission. (*See, e.g.*, Add. at 11 (appellate court concluding: "Therefore, the elements of reformation are not satisfied[.]"). The court's review for such conclusions is *de novo*.

Additionally, the district court addressed evidence bearing on the equities of the case. (*See, e.g.*, Add. at 31 ("Everyone agrees that the deal here proceeded as everyone expected and that everyone really was on the same page. ... All parties were represented by counsel. All parties were aware of the potential consequence of a stock sale purchase agreement; that is, that all of the assets and liabilities would transfer."); Add. at 34 ("But the parties all knew that a stock transaction would transfer everything that was not specifically excluded. Ultimately, Plaintiffs took the risk that the underlying assets might be more or less than they thought by structuring the transaction as a stock transaction[.]")). So, too, did the court of appeals. (*See, e.g.*, Add. at 10 ("SCI knew that the stock sale would result in the transfer of all of Crystal Lake's assets and had the benefit of written agreements that addressed the risks associated with the automatic transfer of all corporate assets."; "Ignoring the stock-sale form of a contract under these circumstances would excuse the seller from exercising due diligence to identify the corporate assess that will transfer pursuant to the sale.")). Presumably such assessment led the appellate court to speak in terms of a more deferential review standard in holding that the "district court's refusal to grant reformation was not manifestly contrary to the weight of the evidence." (Add. at 11). Under either a deferential or de novo standard of review, SCI cannot prevail.

If the court were to reverse the court of appeals and the district court, judgment for SCI would not automatically follow. A reversal would require a remand to the district court to exercise equitable discretion. *See, e.g., Dakota County H.R.A. v. Blackwell*, 602 N.W.2d 243, 244 (Minn. 1999) ("[a] party does not have an automatic right to specific performance as a remedy for breach of a contract; the district court must balance the equities of the case and determine whether the equitable remedy of specific performance is appropriate."); *R.W. v. T.F.*, 528 N.W.2d 869, 872 n.3 (Minn. 1995) (res judicata has enumerated elements that must be proved, but it is an "equitable doctrine that must be applied in light of the facts of each individual case" and even where all elements are met the district court may still inquire whether the doctrine's "application would work an injustice on the party against whom estoppels is urged"). The appellate court's would then review the decision of the district court for whether the decision was manifestly contrary to the evidence.

If the court determines that the plaintiff made a prima facie case for equitable relief, the proper disposition would be to remand the case for the district court to exercise its discretion and fashion the appropriate equitable remedy based upon the exigencies and facts of the case. *See Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979); *Pooley v. Mankato Iron & Metal Inc.*, 513 N.W.2d 834, 837 (Minn. Ct. App. 1994), *rev. denied* (Minn. May 17, 1994). Even if a prima facie case has been made, the district court still has the discretion to grant narrow or broad equitable relief, or to decline to order any equitable remedy.

Reversal is not warranted, nor remand justified, because the undisputed facts demonstrate that SCI cannot make a prima facie case for either of its equitable clams.

II. SCI'S NEGLECT DOES NOT JUSTIFY CHANGING MINNESOTA REFORMATION LAW

The court of appeals affirmed Judge Messerich's conclusions that "[t]he legal requirements for reformation have not been met here." (Add. at 11, 32). The long-standing predicates to reformation are neither ambiguous nor controversial:

> A written instrument can be reformed by a court if the following elements are proved: (1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party.

Nichols, 294 N.W.2d at 734 (citations omitted).

While SCI pays lip service to these elements, the sum and substance of SCI's case is about only the second factor, intent. A determination that SCI failed to satisfy even one of the established considerations is sufficient to affirm.

A. No Other Actual Agreement In The Record.

Minnesota law could not be more clear that a reformation demand must be supported by proof of "a valid agreement between the parties" different from the contract actually executed. *See, e.g., Nichols*, 294 N.W.2d at 734. More specifically, the proponent must have proof that the parties actually agreed to the terms that would be imposed by the reformation. *See, e.g., Theros v. Phillips,* 256 N.W.2d 852, 858 (Minn. 1977). Thus, in this case, precedent requires proof that the parties actually agreed to

exclude the Vacant Land from the transactions. (App. at 33) (SCI's demand that the courts to reform the transactions to now exclude the Vacant Land).

Judge Messerich found that SCI presented no evidence of an actual agreement different than the one executed by the parties. To the contrary, the district court found that "the July 20, 2005 contract did exactly what the parties expected it to do – it sold the stock of the Crystal Lake Cemetery Association first to Corinthian and then to Washburn." (Add. at 30). (*See id.* at 31 ("Everyone agrees that the deal here proceeded as everyone expected and that everyone really was on the same page.")).

1. Different intent is not sufficient.

As it tried to do before the district court and court of appeals, SCI attempts to overwhelm this court with exclamations about whether the parties specifically intended to include the Vacant Land in the transaction. (SCI brief at 20-22). That is not the point, however, of the court's inquiry in an equitable reformation case. SCI has never presented a shred of evidence establishing that the parties actually agreed to terms different from those executed on July 20, 2005. Reformation is not available under Minnesota law absent clear and convincing evidence of an actual agreement differing from the Stock Sale Agreement and Share Purchase Agreement. *See, e.g.*, *Theros*, 256 N.W.2d at 858.

For instance, *Nichols* contemplates reformation as being appropriate when "both parties agree as to the content of the document but that somehow through a scrivener's error the document does not reflect that agreement." 294 N.W.2d at 734. Importantly, "[w]hen both parties acted in good faith and neither misled the other, but nevertheless each party was mistaken and thought he was making a different contract from what the

other party supposed he was making, reformation is not an appropriate remedy." *Id.* (emphasis added) (citing *Bancharel v. Patterson*, 64 Minn. 454, 67 N.W. 356 (1896)). "Absent ambiguity, fraud or misrepresentation, a mistake of one of the parties alone as to the subject matter of the contract is not a ground for reformation." *Id.* (citing *Olson v. Shephard*, 165 Minn. 433, 206 N.W. 711 (1926)).

In *Nichols*, this court addressed a $30,000 note and mortgage drawn up by the bank-defendant. *Id.* Although the debtor-plaintiffs' intent and belief were that the mortgage would be for $10,000, the documents were signed as drafted. *Id.* at 733-34. In seeking reformation the plaintiffs presented no evidence that the parties had ever agreed to a $10,000 mortgage; nonetheless, the district court reformed the mortgage from $30,000 to $10,000. *Id.* at 731-32.

This court reversed, concluding that the contract could not be changed because the terms reflected exactly what the parties had discussed and agreed to, and there was no "fraud, misrepresentation or inequitable conduct by the defendant." *Id.* at 734. Although the *Nichols* plaintiffs may have intended to agree to different terms, the high court observed: "had plaintiffs read the documents before they signed them, their mistake as to the contents would have been discovered before they suffered any harm. Were this court to allow reformation, it would not only destroy the defendant's right to rely on plaintiffs' written assent to the agreement, but would reward plaintiffs for their negligence." *Id.* (emphasis added). Because the plaintiffs sought to reform the contract to a deal that had never been struck, reformation could not be allowed.

The court reached the same result in *Theros*, in which a plaintiff sought reformation of a deed to exclude certain land that the plaintiff wanted back. 256 N.W.2d at 854. The plaintiff alleged a mistake because the boundary line as stated would leave the plaintiff's neighboring restaurant without parking space. *Id.* at 857. In reality, no party had contemplated leaving space for a restaurant and thus there could not have been a mistake in failing to exclude such land from the deed. *Id.* ("There could hardly have been a mistake about the location of the boundary line in relation to the restaurant when the restaurant was not in existence.").

This court made clear that all reformation elements must be established to open the door to equity: "in a reformation action the plaintiff, in addition to demonstrating mistake, must prove what the actual agreement was between the parties." *Id.* at 858 (emphasis added) (citation omitted). "The trial court found that no actual agreement existed other than the one contained in the 1941 deed. ... The record demonstrates that plaintiffs did not present consistent, clear, unequivocal, and convincing evidence of a specific and different [contract]." *Id.* (emphasis added).

The court likewise rejected the claim of a seller asserting different intent – but not presenting evidence of a different agreement – in *Cool v. Hubbard*, 293 Minn. 349, 199 N.W.2d 510 (1972). The *Cool* seller sought to reform a land deal to exclude certain bluff property that had transferred as part of a larger tract. *Id.* at 351, 199 N.W.2d at 511. The evidence established that the seller never intended for the bluff property to transfer, but also confirmed that the seller did not ask for the exclusion until after the deal had closed. *Id.* at 352, 199 N.W.2d at 512. Applying established precedent, this court again held that

the judiciary cannot entertain reformation absent clear proof "that there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties." *Id.* at 354, 199 N.W.2d at 513 (quotation omitted). The court concluded: "Clearly, the evidence, which we have fully reviewed, supports the trial court's refusal to find mutual mistake in this case." *Id.*

More recently, in *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303 (Minn. 2003), the court again confirmed that a reformation plaintiff must present evidence that the parties actually agreed to (not merely intended) terms different from those in the contract as executed. In *Alpha Real Estate*, a prospective tenant agreed to enter into a lease that required remittance of 5% of adjusted cash receipts to the lessor during the lease's first 10 years. *Id.* at 305. The lease was to include an option to purchase, and also specify that if the option were invoked the 5% term "shall continue for the remainder of the 10 year period" (the "survival clause"). *Id.* The tenant and landlord subsequently negotiated and entered into a fully-integrated lease that included the 5% obligation and the purchase option, but not the survival clause. *Id.* at 306. Litigation ensued years later when the landlord refused to honor the purchase option unless the tenant agreed that the survival clause remained in effect. *Id.*

The district court effectively reformed the lease to include the survival clause, reasoning that "the absence of language regarding the five percent surcharge from the 1997 Lease was the result of an error; the absence of the language regarding the five percent surcharge did not reflect the intent of either party. It was not negotiated." *Id.* at 308 (emphasis added). If it was not negotiated, of course, it could not have been agreed

to. Accordingly, this court reversed because there was "no evidence of a drafting error; nor is there evidence of mutual mistake, fraud, misrepresentation or inequitable conduct. Reformation was not an appropriate remedy." *Id.* at 314.

The Eighth Circuit also has applied Minnesota law to preclude reformation when there is no evidence that the parties had an actual agreement different from the contract as executed. *Employers Mut. Cas. Co. v. Wendland & Utz, Ltd.*, 351 F.3d 890 (8th Cir. 2003). *Employers Mutual* arose after a law firm attempted to reform auto insurance contracts to include coverage for a car accident involving one of its lawyers. *Id.* at 892. The district court rejected reformation because "the law firm never contacted [the insurer] about providing coverage for ... employee-owned vehicles." *Id.* Adhering to Minnesota's demanding burden of proof on the party seeking reformation, the Eighth Circuit affirmed because "above all, there must be evidence that there was an actual agreement as to the terms of the policy." *Id.* at 895 (emphasis added) (quotation omitted).[7]

SCI all but ignores these dispositive precedents. The fatal flaw common to the reformation claims in each case was the plaintiffs' lack of proof that the parties actually

[7] The Minnesota court of appeals has repeatedly enforced the same standard. *See, e.g., Norwest Bank Minn., N.A. v. Ode*, 615 N.W.2d 91, 95-96 (Minn. Ct. App. 2000) (rejecting reformation claim despite alleged unjust enrichment because the contract as executed accurately reflected the parties' negotiations and could not be reformed to now reflect such a new term; reformation in such circumstances was "an abuse of discretion because it amended the actual agreement" that the parties had reached); *In re Estate of Savich*, 671 N.W.2d 746, 749 (Minn. Ct. App. 2003) (refusing a reformation claim when the proposed "reformed" agreement consisted of terms to which the parties had never actually agreed).

agreed to terms different than those executed. Under this court's settled case law it has never been sufficient that the plaintiff simply establish a different intention for the contracts – the plaintiff also must have evidence that establishes an actual agreement different from the one executed. *See, e.g., Alpha Real Estate*, 644 N.W.2d at 314; *Cool*, 293 Minn. at 354, 199 N.W.2d at 513.

The record here contains no evidence that the parties to the Stock Sale Agreement and Share Purchase Agreement actually agreed to terms different from those in the executed contracts. (Add. at 31 ("[T]he Court cannot rewrite a contract that did what it was intended to do – sell 100% of the stock of one company to another company.")). SCI does not suggest otherwise. As a result the reformation demand fails. *See, e.g., Theros*, 256 N.W.2d at 858 (rejecting claim because "[t]he trial court found no actual agreement existed other than the one [executed]").

Moreover, the reason for this court's rejection of reformation in *Nichols* is as applicable as ever: "were this court to allow reformation, it would not only destroy the defendant's right to rely on plaintiffs' written assent to the agreement, but would reward plaintiffs for their negligence." *Nichols*, 256 N.W.2d at 734. SCI seeks just such an impermissible reward. (App. at 290) (deposition of Cruger) ("Q. Is it fair to say that SCI did not perform adequate due diligence in this case? A. I certainly would have hoped that – I think that's a fair assumption."). Like the plaintiffs in *Nichols*, SCI's neglect of due diligence and/or failure to negotiate different terms has – in hindsight – turned out to be costly, but under Minnesota law such a mistake is insufficient to fill the void of having no

evidence of an actual agreement different than the terms executed. Equity simply will not step in to impose terms to which the parties never agreed.

2. Uniform testimony confirms there was no agreement to exclude the Vacant Land.

But SCI does not just lack evidence of an actual agreement different from the executed terms – its own witnesses testified that the parties absolutely did not agree to the proposed reformed terms. (App. at 65-67 (deposition of Kirkpatrick) and 290 (deposition of Cruger)). Instead, they specifically agreed to a contract term that provided for exclusion of certain property, and SCI simply failed to avail itself of that protection it had negotiated.

It is elementary to a reformation claim that the court have "clear and consistent unequivocal and convincing" proof that the "reformed" term was, in fact, the parties' actual agreement. *Nichols*, 294 N.W.2d at 734. SCI's specific reformation request asks the judiciary to amend the Crystal Lake stock contracts "so that the Vacant Land is expressly excluded from the transactions." (App. at 33). Granting or denying SCI's reformation demand thus necessarily turns upon whether the evidence establishes that the parties did, in fact, agree to exclude the Vacant Land assets as SCI would have the contracts now say. But there is no basis in the record for granting such relief.

By operation of Minnesota law, a stock transaction automatically includes the transfer of all underlying corporate assets and liabilities. *Specialized Tours*, 392 N.W.2d at 536. That result is black letter law. *See* Robert Charles Clark, CORPORATE LAW 405 (1986) ("Unless transferred or gotten rid of before [a stock transfer], all assets and

liabilities of [the company sold] become assets and liabilities of [the new owner of the stock]. ... This automatic transfer includes assets and liabilities of which the acquiring corporation had no knowledge[.]") (emphasis added). Consistent with this legal reality, both SCI and Corinthian knew that all underlying assets and liabilities automatically transfer with the stock. (Add. at 31 ("All parties were aware of the potential consequence of a stock sale purchase agreement; that is, that all of the assets and liabilities would transfer.")). Logically and legally, given that all underlying assets are automatically included in a stock transaction, the question in a case like this necessarily turns upon whether the parties separately agreed to exclude particular assets. The evidence is that they specifically agreed to a mechanism to exclude certain assets if identified, and the evidence is equally clear that SCI did not exercise that negotiated contractual right.

SCI inverts both the law and logic by focusing on the parties' intent to include assets. *See, e.g.*, SCI brief at 21-22. With corporate stock, however, an intent to include underlying assets is the default understanding. Adopting SCI's contrary argument would ignore Minnesota law, and also absurdly require parties to identify each and every particular asset that they want to transfer with the stock. Indeed, if – as SCI would have it – the law is now going to require that parties to a stock transaction identify the particular assets they agree to transfer, then the necessary implication would be that assets not so identified are not included in the stock transaction. Such a rule of law would fly in the face of governing legal standards, not to mention destroy the understanding by which stock transfers have been transacted for decades. Yet such

would become the rule of law if the established Minnesota analysis is abandoned to grant relief to SCI here.

SCI did not execute a contract different from the parties' actual agreement, but instead failed to investigate the extent of the assets that would transfer pursuant to that actual agreement. (Add. at 30 ("Someone at SCI knew that the Vacant Land was part of the Crystal Lake assets[.]")). Again, SCI's own witness dispositively testified that "[t]here was no specific agreement to exclude [the Vacant Land assets] from this transaction." (App. at 290) (emphasis added). Unfortunately for SCI, this means it cannot satisfy this court's reformation prerequisite of clear proof of a different, actual agreement. From any vantage point, a court cannot rationally grant reformation when the proponent's own witnesses testified that the parties did not have the different, actual agreement that the judiciary is asked to impose.

The law enforced below is neither novel nor mysterious. Courts routinely apply Minnesota reformation standards to find that, absent proof of an actual agreement different from the terms executed, equity will not intervene. The consistency of these decisions fosters certainty in commercial transactions. SCI would have this court abandon the very reformation element that proved dispositive in the cases discussed above, and which has been relied upon in countless commercial transactions, so that parties may petition courts to re-draft contracts to reflect terms that the parties positively did not agree to. Such a dramatic change in Minnesota precedent cannot be justified merely to provide SCI, which failed to investigate the scope of the assets owned by its

subsidiary first before agreeing to sell the stock and second before closing, a third chance to conduct due diligence of its own property.

B. No Evidence Of Mutual Mistake

In addition to lacking any evidence (much less clear proof) of an actual agreement different from the terms executed, SCI did not establish a "mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party." *Nichols*, 294 N.W.2d at 734 (citations omitted). Critically, Judge Messerich found no mutual mistake; rather "[t]he mistake was made solely by SCI." (Add. at 30). Completing the *Nichols* analysis, the district court observed that the record included "no evidence that there was any fraud or misrepresentation by either party as to what was going to happen. While the result appears inequitable, it is not because of some inequitable conduct by a party during the negotiation process." (*Id.*) (emphasis added). Under Minnesota law this conclusion of an unforced, unilateral error is independently dispositive regardless of SCI's failure to present evidence of a "different actual agreement." Nonetheless, SCI completely ignores this additional basis for precluding reformation. While SCI should be precluded from addressing these issues for the first time on reply,[8] a brief review of the controlling law shows that SCI cannot succeed.

Nichols holds that when the underlying document reflects at least one of the parties' understanding of the agreement, there can be no "mutual" mistake. 294 N.W.2d at 734 ("There is no evidence here of scrivener's error, since the documents did reflect

[8] *See Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987).

the defendant's understanding of the agreement."). It is undisputed that the agreements perfectly reflect the unequivocal stock transactions that Washburn-McReavy negotiated and executed, and that Washburn-McReavy had no reason to think to exclude the Vacant Land assets and thus could not have been mistaken in that regard. (Add. at 8 ("Because there was never an intention to exclude the parcels, there is no basis to reform the contract to accomplish this result.")); (Add. at 30 (the contract "did exactly what the parties expected it to do")). This court rejects mutual mistake claims in such circumstances. *See, e.g., Hanson v. N. States Power Co.*, 198 Minn. 24, 268 N.W. 642 (1936).

Hanson arose from a car accident involving serious injuries. *Id.* at 25, 268 N.W. at 642. In negotiating a settlement with the driver, defendants secured releases from all passengers in the car. *Id.* at 25, 268 N.W. at 643. The driver's wife (a passenger) later filed suit against the defendants for her injuries, alleging the contractual release could be voided due to a mutual mistake regarding the extent and nature of her injuries. *Id.*

The court flatly rejected the "mutual" mistake charge because the defendants bought a general, unqualified release and had no awareness regarding the nature and extent of the underlying injuries at the time of executing the contract. *Id.* at 28, 268 N.W. at 644. Thus, the defendants could not have made a mistake regarding those facts. This court put it in common sense terms:

> [Defendants] did not have her examined, nor did they contact her for the purpose of discussing and determining whether she had suffered injuries or the extent and nature thereof.... Under these circumstances, it is clear that defendants could be laboring under no mistake or misapprehension in making the settlement. While it may be that plaintiff was mistaken as to

> her injuries at the time of signing of the release, the mistake, if any, was not shared by defendants, and therefore, as a matter of law, there was clearly no mutual mistake.

Id. (emphasis added).

Also on point is *Jablonski v. Mut. Serv. Cas. Ins. Co.*, 408 N.W.2d 854 (Minn. 1987), in which the court held that reformation is not an appropriate claim when the contracting parties had no intention one way or the other regarding the subject matter of the proposed amendment. *Jablonski* dealt with an insurance policy for which the insured sought to add underinsured motorist coverage after an accident. *Id.* at 855-57. The plaintiff's reformation contentions were rejected because the evidence established that "the parties had no intent either way concerning [the proposed term] because ... it was neither offered [by the insurer] nor considered by [the insureds]." *Id.* at 857.

The Vacant Land assets, like the injuries in *Hanson* and insurance questions in *Jablonski*, simply were not part of the discussion. The district court's conclusion squarely addresses this dispositive consideration: "There is no evidence either way that the parties intended to include or exclude the vacant land." (Add. at 31). Because Washburn-McReavy lacked knowledge about the Vacant Land assets, it "could be laboring under no mistake or misapprehension." *Hanson*, 198 Minn. at 28, 268 N.W. at 644. What Washburn-McReavy did contemplate was that if SCI was going to exclude any Crystal Lake assets from the sale, it was up to SCI to identify them before closing; when SCI did not exclude the Vacant Land, those assets were, as specifically agreed by the parties, part of the sale even if no one was aware of their existence or value.

Logically, any mistake was SCI's alone. (Add. at 30 ("the mistake was one made solely by SCI.")). By definition, SCI's reliance on a mutual mistake theory is for naught.

Even had SCI attempted to rebut the district court's finding of a unilateral mistake, the claim would also fail in this case because unilateral mistake requires "concealment or, at least, knowledge on the part of one party that the other party is laboring under a mistake." *Keller v. Wolf*, 239 Minn. 397, 401-02, 58 N.W.2d 891, 895 (1953). SCI makes no allegation – and Judge Messerich found no evidence – of concealment or knowledge of mistake on Washburn-McReavy's part. (Add. at 30) (mistake was "not because of some inequitable conduct").

Keller concerned a client who signed a settlement agreement for $7,000 on the mistaken belief that the amount was above and beyond a $2,000 lien filed by her own attorney. *Id.* at 401, 58 N.W.2d at 895. The court rejected the "mistake" theory because the client was aware that the lien had been filed and would have to be satisfied out of the $7,000 settlement. *Id.* Equally important, the unilateral mistake theory failed as a matter of law because there was no "concealment on the part of the [lawyer] or knowledge that [the client] was laboring under any mistake." *Id.* at 402, 58 N.W.2d at 895. Consequently, "mistake" offered no grounds for redress. *Id.*

The court reached the same conclusion in *Hanson*. Having found no mutuality of mistake in that case, the high court observed that the mistake about injuries could only be unilateral in nature. 198 Minn. at 28, 268 N.W. at 644. That cause of action also failed because the "unilateral mistake under which plaintiff was laboring was in no way due to the fraud or other misconduct of defendants or their agents." *Id.*

Judge Messerich got it right. Any mistake regarding excluding the Vacant Land assets rests solely with SCI because SCI is the only party who knew anything about those assets in the first place. (Add. at 30). Plus, Washburn-McReavy had nothing to do with SCI's error. Hence the record before the district court fell squarely into the standards formed in *Jablonski*, *Hanson*, and *Keller*. This is yet another basis on which to affirm.

C. SCI's Mistake About Assets Underlying Stock Is Not Sufficient To Invalidate The Stock Sale.

Even if this court somehow were to find that the parties actually intended and agreed to exclude the Vacant Land assets, and were also to ignore the fact that SCI committed a unilateral error, enforcing the executed agreements still would be the right decision because this court has declared that there is no actionable mistake in a stock transaction when the mistake pertains not to the contract's subject matter (*i.e.*, the stock) but to the underlying assets. *Costello v. Sykes*, 143 Minn. 109, 172 N.W. 907 (1919).

Costello arose out of a transaction in which Calhoun State Bank stock was sold on the assumption that the underlying assets included paid-in capital of $35,000, a surplus of $5,250, and undivided profits of $6,000. *Id.* at 110, 172 N.W. at 908. Based upon that understanding of the company's assets, the defendant sold shares to the plaintiff for $1,360. *Id.* at 110-11, 172 N.W. at 908. In reality, "the parties to the sale were mutually mistaken as to the assets of the bank, the actual value and the book value of its stock, and the amount of its surplus and undivided profits." *Id.* at 111, 172 N.W. at 908 (emphasis added).

The aggrieved party sued to rescind the stock deal because of this mutual mistake about the assets, but this court recognized "the subject-matter of the contract of sale was ten shares of the capital stock of the bank. There was no mistake as to its identity or existence. A mistake relating merely to the attributes, quality, or value of the subject of a sale does not warrant a rescission." *Id.* Notwithstanding the mistake about underlying assets, the court found that the plaintiff got exactly what it bargained for, namely, the bank stock. *Id.* at 112, 172 N.W. at 908. Indeed, in terms squarely prescient for the instant case, the court declared:

> If the question were one of first impression, we should not be inclined to open up a new field for litigation by adopting the rule that a contract for the sale of corporate stock may be rescinded merely because both parties were mistaken about the nature or extent of the assets or liabilities of the corporation, if the means of information are open alike to both and there is no concealment of facts or imposition.

Id. at 113-14, 172 N.W. at 909 (emphasis added). It does not get more apposite than that.

Following this court's unmistakable directives, the court of appeals has applied *Costello* to preclude relief from a stock deal on grounds of a mistake about underlying assets. In *Beasley v. Medin*, 479 N.W.2d 95 (Minn. Ct. App. 1992), the district court had found that "rescission was appropriate because the parties were mistaken about [the company's] financial condition at the time of the stock sale." *Id.* at 98. The appellate court reversed, however, because the aggrieved party had failed to make a pre-closing "reasonable inquiry" into the financial condition of the company whose stock had been sold. *Id.* at 98.

Like the *Costello* litigants, SCI complains that the parties to the transactions were mistaken about the true extent of the underlying assets. But also like the *Costello* litigants, SCI has produced absolutely nothing in the record suggesting any party labored under a mistake as to the actual subject matter of the transaction: the stock. (Add. at 8 ("[T]he actual subject matter of the sale was the corporate stock.")); (Add. at 27 ("The parties agree that Crystal Lake's stock was the subject matter of the parties' ultimate Stock Sale Agreement.")). Moreover, as in *Beasley*, the complaining party here failed – and admits that it failed – to undertake a reasonable inquiry into the underlying assets. (App. at 289 (SCI's agent confessing mistakes in due diligence efforts), at 290 (confirming SCI had means to realize ownership of the Vacant Land assets), at 290 (conceding SCI failed to perform adequate due diligence)). More than that, SCI precluded Washburn-McReavy from attempting its own inquiry regarding the extent of Crystal Lake's assets. (App. at 186 (SCI refused to produce balance sheet)). On these facts Judge Messerich correctly refused the equitable remedies sought by SCI.

SCI loses the forest for the trees in saying *Costello* is irrelevant to reformation because the precedent arose in the rescission context. SCI brief at 23. The foundation for both reformation and rescission in this case is the alleged "mutual mistake." *Costello* declared that an error about assets underlying a stock transaction is not a "mutual mistake." *See Nichols*, 294 N.W.2d at 734 (identifying all elements required for reformation). The fact that different remedies are at issue does not obscure this court's clear rules regarding the exact sort of mutual mistake claim that SCI makes here.

The only difference between this case and *Costello* is that the underlying assets were presumed to be less in this case and presumed more in *Costello*. This is a distinction without difference for purposes of Minnesota law: the court's unqualified rule turns upon whether the parties were mistaken in making the stock the subject matter of the contract, not whether a party mistakes the underlying assets to be more or less.

Additionally, the legal principles that this court has applied in a stock sale with mistakenly overvalued assets have been applied with equal force when parties mistakenly assume the assets underlying a stock transaction to be less than they actually were. In *First Nat'l Bank of Birmingham v. Perfection Bedding Co.*, 631 F.2d 31 (5th Cir. 1980), National Mattress Company ("National") purchased the stock of Perfection Bedding Company ("Perfection") for $162,000 pursuant to a stock purchase agreement. *Id.* at 32. Months before the stock sale, Perfection's employee pension fund had been terminated with $611,193 in excess assets. *Id.* National was not aware of these assets when it purchased the stock. *Id.* at 33. In litigation to determine ownership of the previously-unknown assets, the district court awarded 66.47% (or $406,260) of the previously unknown assets to National (as the new owner of Perfection) and the remainder to the employee-participants; the former Perfection stockholders got nothing. *Id.*

On appeal, the former Perfection stockholders argued "that, while they were aware of the excess assets, they were mistaken in believing that the assets did not pass to National as an incident of the sale of the stock. Secondly, they contend that since National was unaware that this additional corporate asset existed and that the sale of Perfection's stock transferred the excess assets, National was similarly mistaken." *Id.*

Like the court in *Costello*, the Fifth Circuit rejected the mutual mistake arguments because National had purchased the stock and hence, by operation of law, acquired whatever underlying assets followed the company. *Id.* The appellate court reasoned: "[t]here has been no showing that National misunderstood the legal implications of a stock transfer, namely, that in its stock purchase National was assuming both the assets and liabilities of Perfection. Moreover, the record is devoid of any suggestion of fraud or misrepresentation on the part of National." *Id.* Even though enforcement of the law would result in a tripling of National's investment on account of the former stockholders' mistake, the law prevailed.

Exactly like the parties in *Costello* and *First National Bank*, the parties here were not mistaken about the subject matter of the Stock Sale Agreement and Share Purchase Agreement – *i.e.*, the Crystal Lake stock. (Add. at 27 ("The parties agree that Crystal Lake's stock was the subject matter of the [deal]."). And the parties knew all assets automatically transfer in a stock deal. (*Id.* ("SCI acknowledges that a stock sale transfers underlying corporate assets and liabilities.")). It is impossible to distinguish this case from *Costello* and *First National Bank*. Thus, as directed by those precedents, this court should affirm the declination of equitable relief.

D. SCI Assumed The Risk

Adopting SCI's proposed rule of law would suddenly place all the risk on a buyer who overestimates underlying assets (*Costello*) and no risk on a seller who underestimates the same. The mantra would become "buyer beware; seller, who cares." There is absolutely no justification for so altering the playing field, especially considering

that a seller like SCI is the party with the most complete and unfettered access to ascertain the assets of the company whose stock was being sold. In fact, it is black-letter law that in these circumstances, the risk that the stock may transfer more extensive assets than the parties believe must rest with the seller:

> [I]t is commonly understood that the seller of farm land generally cannot avoid the contract of sale upon later discovery by both parties that the land contains valuable mineral deposits, even though the price was negotiated on the basic assumption that the land was suitable only for farming and the effect on the agreed exchange of performance is material. In such a case a court will ordinarily allocate the risk of the mistake to the seller, so that he is under a duty to perform regardless of the mistake.

Restatement (Second) of Contracts § 154 cmt. a.[9]

Courts do, in fact, place the risk on the seller in cases like this. For example, the famous decision in *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885), concerned the sale of a stone to a jeweler; both the seller and buyer believed the stone to be worth $1.00. *Id.* at 268, 25 N.W. at 42-43. As it turns out, the stone was an uncut diamond worth $700 to $1,000. *Id.* Rejecting the seller's effort to unwind the sale, the Wisconsin Supreme Court observed that "upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of [the defendant]. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value." *Id.* at 270, 25 N.W. at 44. The court held: "[i]f she chose to sell it without further investigation as to its intrinsic value to a person who was guilty

[9] SCI reads a different Restatement section (§ 157) as condoning this lawsuit (SCI brief at 25), when in fact the provision merely says that a party's fault is not an automatic bar to reformation. Section 154 and its comments make clear the appropriate resolution for circumstances like those now before the court.

of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain." *Id.* (citing *Kennedy v. Panama, etc., Mail Co.*, L.R.2 Q.B. 580). Because "[t]here is no pretense of any mistake as to the identity of the thing sold" (*i.e.*, the stone), there can be no action at law. *Id.*

Like the seller in *Wood*, SCI had every opportunity and right to investigate the thing it was selling. In fact, SCI actually knew (but apparently forgot) about the Vacant Land assets. (Add. at 30). Washburn-McReavy did not – and is not alleged to have – engaged in any fraudulent or otherwise wrongful conduct to induce SCI to sell the stock (and along with it all assets) at the price that it did. This is simply a case of negligent due diligence by SCI. On this evidence, and pursuant to settled Minnesota law, Judge Messerich properly granted summary judgment for Washburn-McReavy.

Finally, SCI has repeatedly asserted that Washburn-McReavy should not gain the benefit of any unknown assets. With respect, it is inappropriate to ask this court to judge who should get the benefits and be saddled with the burdens of a commercial transaction; rather, it is the court's duty to enforce the law and let the benefits and burdens lie where they may. Courts have never picked "sellers" or "buyers" as winners or losers in a mistake case, but instead have faithfully applied the law regardless of which side "should gain the benefit." Indeed, under the exact same legal principles the seller of stock in *Costello* got the benefit of mistake, whereas the buyer of stock in *First National Bank*, the buyer of the release in *Hanson*, and the buyer of the mortgage in *Nichols* ended up

better off. Thus it is not a question of which side should get the benefit; it is which side has the law.

III. THE CERTITUDE OF MINNESOTA RESCISSION LAW SHOULD NOT BE DISTURBED BECAUSE OF SCI'S FAILINGS

The court of appeals unanimously rejected SCI's rescission demand on the basis of "mutual assent," and Judge Worke expressed neither approval nor dissent with rescission on "mutual mistake" grounds. (Add. at 18 (Worke, J, dissenting) ("I respectfully disagree with the conclusion that appellants are not entitled to reformation.")). There is no reason to change Minnesota law on these doctrines and tear up the underlying contracts simply to cover up for SCI's failures.

A. Mutual Assent Is Everywhere In The Record.

SCI's "mutual assent" claim is no more than an effort to try to shoehorn this case into the analytical framework of *West Coast Airlines, Inc. v. Miner's Aircraft & Engine Serv., Inc.*, 403 P.2d 833 (Wash. 1965). But no amount of legal gymnastics can contort this case into any semblance of *West Coast Airlines*.

In *West Coast Airlines*, the parties agreed to a sale of "cans" and it turned out the cans held some aircraft engines. 403 P.2d at 518-19. The Washington court simply held that ownership of the engines did not pass along with the cans because the buyer merely bought the cans, not the contents of the cans. *Id.* at 519. That unremarkable holding says nothing about the mutual assent of the parties in this case.

Under Minnesota law, "mutual assent" merely refers to the parties agreeing to the same thing. *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 532, 117 N.W.2d 213, 221

(1962) ("Expressions of mutual assent, by words or conduct, must be judged objectively, not subjectively."). Importantly, "[w]hether a contract is formed is judged by the objective conduct of the parties and not their subjective intent." *Commercial Assocs, Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. Ct. App. 2006) (citing *Cederstrand*, 263 Minn. at 532, 117 N.W.2d at 221).

That the parties mutually assented to the Crystal Lake stock transactions cannot be credibly disputed. The record is undisputed that SCI offered to sell the Crystal Lake stock to Corinthian, that Corinthian accepted that offer, that Corinthian then offered to sell the stock to Washburn-McReavy, and that Washburn-McReavy accepted Corinthian's offer. (Add. at 26-27, 30). Moreover, "[t]he parties agree that Crystal Lake's stock was the subject matter of the parties' ultimate Stock Sale Agreement." (Add. at 27). Not surprisingly, the district court found that the executed contract "did exactly what the parties expected it to do – it sold the stock of the Crystal Lake Cemetery Association first to Corinthian and then to Washburn." (Add. at 30). Judge Messerich reached the only rational conclusion possible: "the parties' rights were governed by a valid contract." (Add. at 34).

The district court and court of appeals (unanimously) had no problem concluding that an actual, purposeful agreement to exchange corporate stock for money, followed by executed contracts giving effect to that agreement, raises no mutual assent concerns. This court should similarly reject SCI's arguments out of hand.

B. The Mistake Is Neither "Mutual" Nor Actionable.

SCI also calls for rescission on mutual mistake grounds. There is no need to reiterate the controlling precedent dispelling SCI's mutual mistake theory given the mistake was unilateral and not pertaining to the actual subject matter of the transaction. *Supra* at 28-36. Plus, this court has squarely rejected "the rule that a contract for the sale of corporate stock may be rescinded merely because both parties were mistaken about the nature or extent of the assets." *Costello*, 143 Minn. at 113-14, 172 N.W.2d at 909.

Inexplicably, SCI persists in arguing that "*Costello* does not govern this case." SCI brief at 30. The only way that *Costello* does not govern this case is if the court abandons its precedent, and SCI urges exactly that. Nothing has changed in the corporate arena to justify abandoning *Costello*. If anything, the ability to marshal and assess information is far greater today than when *Costello* was decided, and thus there can be no reason to give SCI a pass on due diligence that was not afforded in *Costello*. *Costello* remains good on the law and policy and has provided nearly a century of certainty to commercial transactions in this state.

SCI promotes *Clayburg v. Whitt*, 171 N.W.2d 623 (Iowa 1969), as a better rule than *Costello*. In *Clayburg*, the Iowa Supreme Court rejected this court's *Costello* holding, that when the subject matter of a transaction is corporate stock, mistaken assessments of the assets underlying the stock are not grounds for rescission. *Id.* at 626. The Iowa court, like SCI, offered no principled basis for its contrary rule other than to urge looking past the form of the contract. *Id.* On that basis alone, the court should not find *Clayburg* persuasive.

Additionally, in this case, like most – if not all – stock transactions, the form of the parties' agreement is vitally important. (Add. at 9 ("The parties intentionally structured the transactions as a stock sale to allow Crystal Lake to continue operating as a for-profit corporation under Minnesota law.")). Minnesota law cannot, on the one hand, mandate that SCI sell the Crystal Lake stock if it wants to transfer an ongoing profitable business, and then, on the other hand, affirmatively ignore that chosen form when SCI wants to turn back the clock and add new terms. Either the form of the transaction is relevant to Minnesota law, or it is not at all. *Costello* firmly grounds this state in the former camp, and there is no reason – and certainly no logic – to abandoning those principles for Iowa's way.

Finally, SCI also inaccurately portrays what actually happened in the courts below. Neither the district court nor court of appeals held reformation and rescission "are unavailable as a matter of law, solely because the parties elected to effect their bargain through a stock rather than asset sale." SCI brief at 14. Nor did the courts rule "regardless of the facts." SCI brief at 4. Rather, the courts held that in this case, and on these undisputed facts, equity will not interfere to declare new transaction terms different from those negotiated and agreed to by sophisticated parties simply because one party later wishes it had negotiated and agreed to different terms after discovering that it had failed to conduct reasonable due diligence as to its own property.

If ever the rule of *Costello* were to be reconsidered, surely this is not the vehicle to do so given that the party complaining about an ownership mistake was the party with all the information and resources to prevent the mistake in the first place. SCI held all the

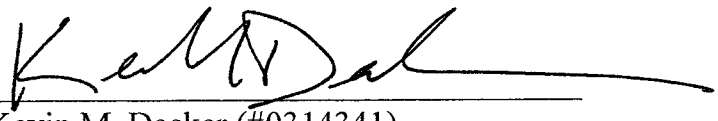
cards in these transactions, and simply failed to avail itself of the contractual protections that it had negotiated. SCI screwed up: it is that simple. Like the plaintiff in *Costello*, SCI is not entitled to avoid the contract it negotiated simply because it did not adequately look out for its own interests.

CONCLUSION

Under established and settled Minnesota law, the undisputed record in this case requires affirmance of the decisions of the lower courts. SCI executed the precise contract that had been negotiated and expressly agreed to. In reaching agreement, SCI never asked the buyer to exclude the Vacant Land. Moreover, it received contractual protections against the inclusion of assets that it claimed should not be part of the transaction. Because of its own lack of diligence, SCI failed to avail itself of that contractual protection. The law does not allow a party in SCI's position to ignore its due diligence responsibility and agreement, and then have the court re-write the contract it signed. There is no basis to overrule the long line of cases that compelled the district court and the court of appeals to reject SCI's claim for equitable relief. Those decisions should be affirmed.

Dated: July 28, 2010

BRIGGS AND MORGAN, P.A.

By: 

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Washburn-McReavy Funeral Corporation and Washburn-McReavy Cemetery Association certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a)(1) in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains less than 14,000 words, excluding the Table of Contents and Table of Authorities.

Dated: July 28, 2010

Kevin M. Decker

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